



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 48 OF 2019

WILLIAM LALO BAYA....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the sentence imposed on the appellant on 31st October, 2014 by Hon. P.K. Mutai, Resident Magistrate, in Kwale Principal Magistrate's Court Criminal Case No.188 of 2014).

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with (4) (sic) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 19th day of February, 2014 at [particulars withheld] village, Waa location in Kwale County within Coast Region intentionally caused his penis to penetrate into (sic) the vagina of MJN [name withheld], a child aged 16 years. The appellant was sentenced to 15 years imprisonment.
2. On 15th May, 2019 he filed his petition of appeal. He amended his grounds of appeal on 10th December, 2019, with leave of the court. They are to the effect that mandatory sentences can be reviewed after an appellate court has considered mitigating circumstances, the right to fair hearing cannot be limited and that every person has the right to a fair trial. The other ground of appeal is that under the provisions of Article 50(2)(p) of the Constitution, every person has the right to a fair trial and to benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.
3. In his written submissions, the appellant relied on the decision in **Francis Karioko Muruatetu** [2017] eKLR, where in his view, the Supreme Court held that mandatory sentences are unconstitutional, as they deprive Trial Courts the discretion in sentencing.
4. He further submitted that mandatory sentences discriminate in the sense that such laws give differential treatment to convicts, which is very distinct from the kind of treatment that is accorded to convicts, tried under laws that do not impose mandatory sentences.
5. The appellant submitted that there were mitigating factors in his case such as him being a first offender. He urged this court to look at the same. He prayed for this court to impose a less severe sentence. He relied on the case of **S v Malgas** 2001 (2) SA 1222 SCA 1235 at paragraph 25. He also relied on the decision in **Samuel Achieng Alego v Republic** [2018] eKLR, and **Baraka Safari v Republic** [2018] eKLR, where the High Court reduced sentences for appellants who had been convicted for sexual offences.
6. Ms. Mwangeka filed written submissions on 12th February, 2020. She stated that the appellant was rightly and lawfully convicted and sentenced after the court took into account the fact that he was a first offender, that he stays alone, has no relatives and that he was remorseful.
7. In citing the decision in **Francis Karioko Muruatetu v Republic** (supra), she said that courts consider factors such as remorsefulness of the offender and the possibility of reform and social re-adaptation of the offender. She submitted that the appellant had not been rehabilitated and urged this court to take judicial notice of the prevalence of sexual offences perpetrated against minors. She asserted that the sentence of 15 years imprisonment in this case should not be disturbed.

DETERMINATION

The only issue of determination is if the sentence imposed on the appellant should be reduced.

8. The grounds of appeal filed by the appellant are indicative of the fact that his appeal is only against the sentence of 15 years imprisonment

imposed on him. In his submissions, he contended that the complainant was a few months from attaining the age of 18 years and was therefore fully aware of what was going on between him and her. He also stated that in a substantial number of instances, girls even below the age of 14 years engage in sexual intercourse knowing fully well what was happening.

9. From his written submissions, it is apparent that the appellant looks at girls between the age of 14 and 18 as persons who can be defiled. The position of the law is that it matters not if a child is a day shy of attaining the age of 18 years, as long as a person has sexual intercourse with such a child, it amounts to defilement, as such a child is a minor and is protected by the law from sexual offences.

10. The appellant cannot leverage his appeal on the argument that girls as young as 14 years old engage in sexual intercourse. Instead of him demonstrating how remorseful he was for having defiled the victim herein who was 16 years old, his submissions took a trajectory which tried to justify his action in having defiled the victim. In the case of **Bernard Kimani Gacheru v Republic [2002] eKLR**, the Court of Appeal stated thus on the issue of the Trial Court's discretion in sentencing:-

" It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."

11. In the present case, there is no factor which has been raised that can persuade this court to interfere with the sentence imposed on the appellant. I therefore uphold the sentence of 15 years imprisonment which was imposed on him by the Trial Court. The appellant was out on bond pending trial, his sentence shall therefore run from the 31st October, 2014 when he was sentenced by the lower court. The appeal herein is dismissed in its entirety. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of October, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

The appellant

Mr. Muthomi, Prosecution Counsel - for the DPP

Mr. Oliver Musundi - Court Assistant